

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: APPLICATION OF	:	
HORNBEAM CORPORATION	:	
	:	
- - - - -	x	
	:	
PANIKOS SYMEOU,	:	
	:	
Intervenor-Appellant	:	NO. 17-658
vs.	:	
	:	
HORNBEAM CORPORATION,	:	
	:	
Appellee	:	

Transcript of audio of the hearing
before the United States Court of Appeals for the
Second Circuit, in the above matter, held at the
United States Courthouse, Foley Square, in the City
of New York, on Thursday, January 4, 2018.

PRESENT:

JOHN M. WALKER, JR.,
REENA RAGGI,
RAYMOND J. LOHIER, JR.,

Circuit Judges

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1 A P P E A R A N C E S:

2 MARKS & SOKOLOV, LLC
3 BY: BRUCE S. MARKS, ESQUIRE
4 11 Penn Center - 28th Floor
 1835 Market Street
 Philadelphia, Pennsylvania 19103

5 Counsel for Appellant

6 HOGAN LOVELLS US, LLP
7 BY: DENNIS H. TRACEY, III, ESQUIRE
8 875 Third Avenue
 New York, New York 10022

9 Counsel for the Appellee

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1 THE COURT: All right, then, the
2 first case is In Re: Application of
3 Hornbeam Corp., Symeou vs. Hornbeam
4 Corporation.

5 Thank you.

6 MR. MARKS: May I begin, Your
7 Honor?

8 MR. TRACEY: Yes, please.

9 MR. MARKS: I'm Bruce Marks. I
10 reserve two minutes for rebuttal.

11 Your Honor, the twin aims of
12 Section 1782 were to provide efficient
13 means of assistance to participants in
14 international litigation, to encourage
15 foreign countries to provide such
16 assistance to our courts.

17 I'd suggest that congress in
18 foreign countries would not consider what
19 occurred in this case to be effective or
20 worthy of encouragement.

21 Let me suggest six things which
22 happened.

23 One, here, an American court
24 held an ex parte hearing, without any

1 reason, heard one-sided argument from
2 Hornbeam; never asked why the adverse
3 parties were not notified, never asked
4 what they would have said if they had been
5 there, and adopted almost verbatim
6 Hornbeam's proposal order --

7 THE COURT: Is the issue of
8 whether a 1792 application could be filed
9 ex parte is moot?

10 MR. MARKS: No, it's not moot.

11 THE COURT: Why not?

12 MR. MARKS: And I'll tell you
13 why.

14 THE COURT: There is a response
15 to the arguments in their briefs about
16 that.

17 MR. MARKS: Yes, sure. This
18 case is different than the other cases
19 that held in dicta that there was a
20 practice to decide these ex parte. This
21 case is different for three reasons, and
22 they are described in our brief.

23 We suffered harm. They got
24 ex parte discovery, took discovery, and

1 got extensive bank records, containing
2 confidential information, without any
3 notice at all, because this was ex parte,
4 and they possessed them for over five
5 months before we learned about it.

6 Number two --

7 THE COURT: How are you
8 prejudiced by that?

9 MR. MARKS: Your Honor, they had
10 our records for five months, containing
11 personal information about Symeou and the
12 companies. They could be do anything
13 without -- anything that they wanted with
14 them. They could have given them to the
15 New York Times. There was no protective
16 order. I don't think there's any --

17 THE COURT: How are you actually
18 prejudiced? Apart from what they could be
19 or what they might have done, how are you
20 actually prejudiced?

21 You had the chance to come back
22 make your motion and litigate this matter.

23 MR. MARKS: We are prejudiced by
24 the mere fact, Your Honor, that they had

1 them for five months, we didn't know about
2 it; there was no protective order in
3 place, and they used that information in
4 the Ohio state court.

5 There's an affidavit from their
6 attorney that they took that information,
7 they used it in the Ohio state court, and
8 we know ultimately when we got in this
9 case the court entered a protective order
10 and only allowed that information to be
11 used in the BVI.

12 So there was clear prejudice by
13 them using information that we never knew
14 that they had, in a domestic proceeding in
15 the United States, when we all know that
16 1782 -- right? -- is designed for aid
17 outside the --

18 THE COURT: What is to
19 preclude --

20 THE COURT: What is the status
21 of the Ohio action?

22 MR. MARKS: Excuse me?

23 THE COURT: What's the current
24 status of the Ohio action?

1 MR. MARKS: It was dismissed in
2 part for forum non conveniens, that they
3 should be refile in the BVI. The
4 dismissal was affirmed, and here we are
5 three --

6 THE COURT: So I go back to my
7 original question, in terms of actual
8 prejudice.

9 MR. MARKS: Your Honor, in terms
10 of actual prejudice, as I say, they had
11 our information for five months without us
12 knowing about it. They used it in a BVI.
13 And we don't really know what they did
14 with it.

15 The principal of the other side,
16 Hornbeam, has it. The fact is that they
17 haven't filed any litigation, so it would
18 appear they haven't used it in litigation,
19 but nobody wants their adversary, who is
20 involved in competing businesses, to have
21 information to which they are not entitled
22 for a long period of time.

23 So that is a --

24 THE COURT: Why is it the

1 appropriate remedy, as I understand it,
2 that you are seeking is a vacatur of the
3 ex parte order since Judge Broderick here,
4 as I understand it, said it would have
5 granted Hornbeam's application even if you
6 participated in the initial hearing?

7 MR. MARKS: Well, let me say
8 this about that. If something does
9 something improperly, if you are not
10 entitled to get something ex parte, there
11 should be a remedy for that. Because if
12 there is no remedy, if you just say "Well,
13 I would have done that anyhow," then there
14 is no sanction for doing things ex --

15 THE COURT: The law doesn't
16 operate that way. There are all sorts of
17 circumstances, even in the criminal
18 context, where something shouldn't have
19 happened the way it did, but if it would
20 have happened properly in any event, the
21 law tolerates it.

22 So here you had a judge grant a
23 protective order. We're talking about
24 what actual prejudice there was, and I

1 haven't heard any identified. So in that
2 sense, the remedy you are seeking seems to
3 be excessive.

4 What am I missing?

5 MR. MARKS: Your Honor, we're
6 seeking different remedies. One of the
7 remedies that we suggested, at a minimum,
8 the court should order them to destroy the
9 records. They have nothing to do with the
10 dispute over Warren Steel. They have bank
11 records of our clients, have nothing to do
12 with the dispute.

13 If their claim is that there
14 were improper transactions with
15 Warren Steel or Halliwell, then give them
16 those bank records. That's what the judge
17 in Alabama did.

18 Let's not forget. Every judge
19 who entered an ex parte order, who then
20 heard our side, changed the order. In
21 Ohio the judge stayed the discovery before
22 they could serve subpoenas.

23 In Alabama, and this is the very
24 important, once the judge there heard us,

1 she said, "You know what? I'm only going
2 to give them the bank records of
3 Warren Steel and Halliwell. You don't get
4 the bank records of the individuals. You
5 don't get the bank records of the related
6 companies."

7 That's really the most important
8 prejudice that we have suffered, because
9 they are not entitled to it.

10 Let them have the bank records
11 of Warren Steel. Let them have the bank
12 records of Halliwell. But as a means of
13 addressing what happened, whether it's a
14 sanction or whether because the discovery
15 was too intrusive, too overly broad, that
16 is the most important thing that we're
17 asking the court to do, make them destroy,
18 give back the bank records that have
19 nothing to do with the companies of which
20 they have an interest.

21 And there's other grounds Your
22 Honor can do that. But, admittedly, they
23 didn't fulfill their duty of disclosure.

24 You asked me, "Well, what should

1 you do about that?" You're going to say,
2 well, there was no prejudice because it
3 would have decided that anyhow. That's
4 not right.

5 If you have a duty of
6 disclosure, and you admittedly violate it,
7 the judge held, well, you know, you can't
8 sanction the party. That's just simply
9 wrong. The Supreme Court has said if the
10 attorney does something wrong, you can
11 sanction the party.

12 We all know under Rule 45, if
13 you issue subpoenas without notice, and
14 that's what happened here --

15 THE COURT: Can you identify a
16 case where we've vacated a 1782 order for
17 something other than the failure to
18 satisfy?

19 MR. MARKS: No, Your Honor, I
20 can't, because this is the first time that
21 I am aware of in this circuit where there
22 was clearly a violation of duty of
23 disclosure.

24 The judge found that. The judge

1 said that there were clearly things that
2 should have been told to me that weren't.

3 We know that from Ohio, Your
4 Honor, because when the judge there
5 learned that they couldn't bring new BVI
6 proceedings until they paid the \$800,000
7 judgment, she immediately stayed the case
8 until they did it. They never did. And
9 that was wrong, too.

10 There's a BVI policy that you
11 can't bring a new case until you pay your
12 judgment from the old one. The judge
13 should have never given the discovery in
14 the first place. And that's what happened
15 in Ohio.

16 What she said, "You know what,
17 they haven't paid the judgment?" You
18 know, we all know under the discretionary
19 factors of 1782, one reason not to give
20 discovery is because it violates the
21 public policy of either the United States
22 or another country. They couldn't use the
23 records in the BVI, because the court
24 wouldn't have allowed the new proceeding

1 to go forward.

2 THE COURT: Until they paid the
3 fine.

4 MR. MARKS: Yes, and they
5 didn't.

6 THE COURT: But we don't know
7 that they wouldn't.

8 MR. MARKS: Well, the judge
9 said, "Give me a break" in Ohio. She said
10 it's so small, if he's so rich, he would
11 have paid the fine, but he didn't. We
12 actually know what happened.

13 The only reason that he paid the
14 fine is we brought execution proceedings
15 in the BVI against the shares, and they
16 ultimately had to pay the fine, or else we
17 would have taken the shares, and then
18 Hornbeam would have had no interest in
19 Halliwell.

20 But, Your Honor, the other issue
21 on the issue of sanctions and prejudice,
22 and Rule 45 we know the cases are legion;
23 if you serve subpoenas without notice,
24 which is what happened here, and then you

1 get discovery, which is what happened
2 here, one of the sanctions that they give,
3 even if the court would have said that
4 subpoena is fine, they say you can't use
5 the discovery, but where we're focused on
6 here, Your Honor, is the records that
7 don't have to do with Halliwell and
8 Warren Steel. They should have never
9 received those records. It's intrusive.
10 It's overly broad. They are not related
11 to their dispute.

12 They haven't even filed a case,
13 anyhow. So if they violated the duty of
14 disclosure, if they served subpoenas
15 without notice, or if you just find
16 independently, which you can do, that the
17 discovery was too intrusive, at the end of
18 day, that is the remedy that we are
19 seeking.

20 Thank you, Judge.

21 MR. TRACEY: Dennis Tracey for
22 Hornbeam.

23 Your Honors, this discovery
24 order, and similar ones, have been issued

1 by five different federal courts around
2 the country and reviewed extensively by
3 them on motions by Mr. Symeou, and in all
4 five cases the order was issued.

5 Indeed, it's been reviewed by
6 the 11th Circuit. The 11th Circuit has
7 considered virtually all of the arguments
8 that are being made here, including the
9 argument about issuance ex parte, and has
10 upheld the discovery order. It's clearly
11 a proper order under 1782. This court has
12 held numerous times, as has every other
13 court that's considered it, that these
14 proceedings may be done ex parte, is
15 commonplace, and it is appropriate.

16 The --

17 THE COURT: Mr. Marks is asking
18 for a very limited remedy, which is to
19 destroy the bank records that have nothing
20 to do with Halliwell or Warren Steel, and
21 I take it that your response is going to
22 be that all of these documents at least
23 will shed light on the alleged fraudulent
24 scheme, right?

1 MR. TRACEY: Your Honor, this
2 issue of the breadth of discovery, I would
3 break it down into two pieces, perhaps.
4 The first is, whether the actual -- there
5 were certain documents that were produced
6 by the banks that were erroneously
7 produced. In other words, they were
8 related to other parties, had nothing to
9 do with this party. So those are, you
10 know, not relevant to this case. We don't
11 care about them. They are never going to
12 be used. They are subject to a protective
13 order, so they can never be disclosed to
14 anybody or used in any proceeding.

15 The complaint that has been
16 raised by Mr. Symeou is that the documents
17 that the court authorized be produced is
18 overbroad, and we don't believe they are
19 overbroad. This has been raised numerous
20 times by Mr. Symeou. The district court
21 has specifically addressed the issue.

22 Originally during the ex parte
23 proceedings, the court looked at the scope
24 of discovery and said, "You know what?

1 This is too broad. I'm not going to allow
2 this," and required the applicant to
3 revise the discovery request to make it
4 more narrow. The judge approved it on
5 that basis.

6 And then when Mr. Symeou
7 objected to the scope of discovery, the
8 court took that very seriously, had
9 several hearings on whether the scope of
10 discovery was appropriate, and properly
11 found, and this is vested in his
12 discretion, that those documents were
13 relevant to the issues that were at issue
14 in the potential foreign proceedings, and
15 we strongly, strongly agree with that and
16 believe that the record strongly supports
17 it.

18 I would point out, also, that
19 the judge was very careful to respect the
20 essential rights of the foreign parties.
21 A very extensive protective order was
22 entered.

23 These documents cannot be, as
24 was said, given to the New York Times.

1 They can't be used in any way. They can't
2 be disclosed. And they actually can't be
3 used in any proceeding, except the BVI
4 proceeding.

5 So the court has exercised its
6 discretion in a very careful way after
7 multiple requests to address this issue.

8 THE COURT: What is the status
9 of the deadline for the BVI proceeding?

10 MR. TRACEY: Under the
11 protective order the court has given us
12 until May of 2018 to either file the BVI
13 proceeding or destroy the documents.

14 That deadline can be extended if
15 we apply to the court and request an
16 extension, and I can't predict whether
17 that's going to happen, but Hornbeam is
18 attempting to gather documents, not just
19 in New York, but in other jurisdictions,
20 including Florida, which is a very
21 important place for the documents in this
22 case, and because of multiple proceedings
23 that we've had in Florida, we have not yet
24 gotten any documents there. So we're

1 still working to collect the documents in
2 order to file a case.

3 In the meantime, we filed a case
4 in the English courts, which was one of
5 the other jurisdictions or one of the
6 other cases that this application was
7 based on.

8 I will just briefly address the
9 issue of the BVI judgment. As the court
10 below properly held, this is a very large
11 case, with a very large amount of money at
12 stake, tens of millions, if not hundreds
13 of millions, of dollars, between two very
14 well-off or three very well-off parties.
15 And in the BVI there was essentially a
16 cost assessment under BVI law of \$846,000.

17 It's not entirely clear whether
18 that would have to be paid before a BVI
19 case can be filed, but it was paid, and
20 there is -- it would be very hard to
21 imagine that a party would walk away from
22 a tens or hundreds of millions of dollars
23 case just because they had to pay a cost
24 assessment in a prior BVI action.

1 So the district court in this
2 case, as well as other cases, have
3 considered this issue and determined, in
4 their discretion, it's a discretionary
5 issue, that the existence of that cost
6 order would not preclude Hornbeam from
7 filing a foreign proceeding.

8 And I'll just, in terms of the
9 Rule 45 issue, as we've noted, that issue
10 is completely moot. The parties have had
11 full opportunity to object to it, but I
12 would point out that there is no
13 requirement in Rule 45 to notify potential
14 adverse foreign parties.

15 Rule 45 requires the prior
16 notice to a party, and it's very different
17 from Rule 27, which if you are going to
18 try to take a deposition of a potential
19 party, there is a requirement,
20 specifically in Rule 27, to notify that
21 potential foreign party. That does not
22 exist in --

23 THE COURT: Why isn't this one
24 of those cases where the issue, the

1 ex parte issue, is capable of a petition
2 to get a date of review?

3 MR. TRACEY: In the sense that
4 a, that a party might be able to --

5 THE COURT: They're really
6 criticizing the ex parte nature of the
7 matter, and you're saying no, no, it's
8 moot, because they subsequently had an
9 opportunity to duke it out, for lack of a
10 better term, and to participate, but why
11 isn't this issue of whether it's
12 appropriate to proceed ex parte one of
13 those issues that might evade a review?

14 MR. TRACEY: There have been
15 many, many cases, Your Honor, involving
16 ex parte proceedings. Of course, the
17 courts have consistently held that
18 ex parte proceedings are appropriate. The
19 real --

20 THE COURT: You are making
21 argument about (inaudible).

22 MR. TRACEY: Yes.

23 THE COURT: That goes to our
24 jurisdiction. So I'm interested.

1 MR. TRACEY: It's an interesting
2 question, Your Honor. It potentially
3 could evade review. It would be
4 reviewable in the event that a subpoena
5 was issued, and I guess there was no,
6 there was no review, and the party then
7 comes in later.

8 THE COURT: So it might not be
9 moot?

10 MR. TRACEY: It might not be
11 moot in other cases.

12 THE COURT: (Inaudible) the
13 district court found that you violated the
14 rule.

15 MR. TRACEY: The district court
16 found that there was no case on point, but
17 that, if you looked at the overall
18 structure of discovery under the Federal
19 Rules of Civil Procedure, he acknowledged
20 that there was no case that held it and no
21 rule that held it, but he thought it was
22 the right, the right way to go.

23 THE COURT: And you have not --
24 I mean, you're arguing with us today that

1 you were under no (inaudible) but you
2 didn't appeal that part of the ruling.

3 I mean, what the district court
4 ultimately did was it declined to vacate
5 or cost, saying that Symeou wasn't
6 prejudiced from the lack of notice, but I
7 don't know how you argue to us that you
8 were under no notice obligation when you
9 haven't appealed that ruling.

10 I mean, you can defend the
11 decision that there was no prejudice, but
12 I'm not sure you can argue that, you can
13 challenge the ruling of the district court
14 now.

15 MR. TRACEY: I accept that, Your
16 Honor. The court did hold that there was
17 no prior guidance on that, and so --

18 THE COURT: I just want to be
19 clear as to what you're asking us now, to
20 say that there is no obligation to give
21 notice in a circumstance such as this, and
22 I don't see why we should do that when you
23 didn't appeal the ruling.

24 MR. TRACEY: I agree with that,

1 Your Honor.

2 THE COURT: All right. But I
3 understand, I took your point to be that
4 that kind of explained why what happened
5 happened.

6 MR. TRACEY: Exactly, Your
7 Honor. At the time that this application
8 was made and the subpoenas were issued,
9 there was no guidance on this, and so to
10 ask for sanctions against the party who
11 acted based on violation of a rule that
12 didn't exist would be inappropriate.

13 THE COURT: Thank you.

14 MR. TRACEY: Thank you, Your
15 Honor.

16 THE COURT: Mr. Marks, I think
17 you reserved two minutes?

18 MR. MARKS: Is this yours or
19 mine? Thanks.

20 Judge, yes. Judge Lohier, it's
21 not moot. The court should address the
22 issue of ex parte. It happens. It's
23 happening all the time. I don't want to
24 argue it in detail. It's in our briefs.

1 In this case it violated a local rule of
2 the Southern District of New York, and
3 there is also a judicial cannon on point
4 regarding ex parte communications.

5 We think it's a serious issue,
6 not just because of us, because, as the
7 court in the Ninth Circuit said, we cite
8 in our brief, ex parte proceedings are
9 anathema to our system.

10 I will let Your Honors decide
11 that issue on the briefs, but we think
12 it's an important issue substantively in
13 this circuit.

14 Next, every judge, there was
15 somebody who just spoke here, ever judge
16 who has heard our side, Florida, Alabama,
17 Ohio, changed their position once they
18 heard our side.

19 In Florida the court stayed the
20 discovery. We still haven't had a hearing
21 on the motion to vacate, but the subpoenas
22 have never been allowed to be served.

23 In Alabama the court did exactly
24 what I said that she did; she narrowed the

1 scope of the subpoenas to only the
2 Warren Steel and the Halliwell records.
3 That's the only thing that the
4 11th Circuit affirmed.

5 In Ohio the court stayed the
6 discovery because she concluded that if
7 they hadn't paid the BVI judgment, which
8 they never did voluntarily, Your Honor,
9 that proceedings were within reasonable
10 contemplation.

11 They still haven't served the
12 discovery in Delaware.

13 I mean, they say that we're the
14 reasons that there's delay? They didn't
15 serve the subpoenas in Florida for a year
16 and a half. They didn't serve the
17 subpoenas in Ohio for a year and a half,
18 and here we are three years later, after
19 they got subpoenas in Delaware, they
20 weren't served; and they had subpoenas in
21 this district against two accounting firms
22 and a law firm, for which the principals,
23 our principals, were clients, they didn't
24 serve subpoenas on them because they knew

1 that those companies would have
2 immediately notified our clients that
3 there was an ex parte order. We only
4 learned about this through the media.

5 THE COURT: Sounds to me like
6 you are making the argument that you will
7 make in May of 2018 when they seek an
8 extension, that they haven't been -- they
9 have been dilatory.

10 MR. MARKS: Well, Your Honor, we
11 don't believe on this record that new
12 proceedings are within reasonable
13 contemplation at all, and that's what the
14 court in Ohio concluded, one she stated,
15 because they didn't pay the BVI judgment,
16 and there was absolutely no rationale for
17 them not to have paid it if they wanted to
18 get the discovery, because they couldn't
19 use the discovery in the BVI.

20 Let me add a point on the issue
21 of disclosure. There is a duty of
22 disclosure; they violated it. The Pioneer
23 case, Supreme Court, in our brief, that's
24 where the client was sanctioned because of

1 the conduct of the attorneys.

2 Let's talk about the notice
3 under Rule 45. It's really a ridiculous
4 point. Of course, there had to be notice.
5 Gushlak, and, Your Honor, you were on a
6 case, I believe, where you cited Gushlak,
7 and said, "Well, this is the practice to
8 do it ex parte for 1782." Why did Gushlak
9 come to that conclusion? It said because
10 you would get notice so that you could
11 challenge the subpoenas. They cited that
12 case in their brief in order to get the
13 ex parte order.

14 How in the world could we have
15 gotten notice to challenge the subpoenas
16 if they didn't provide them to us?

17 Any experienced practitioner --

18 THE COURT: I understand that
19 the one failure, in your mind, aggravates
20 the other, but, you know, at a certain
21 level we take them apart, and I understand
22 why that might support the notice
23 argument --

24 MR. MARKS: Rule 45.

1 THE COURT: -- or that that
2 warrants us saying the ex parte order --
3 revisiting the ex parte orders part.

4 MR. MARKS: Absolutely two
5 different issues, Your Honor.

6 One is the issue, do you have a
7 duty of disclosure in an ex parte
8 proceeding? And if you violate it, what's
9 the sanction? At a minimum the sanction
10 ought to be that they destroy the
11 unrelated records.

12 Second, Rule 45, separate issue,
13 absolutely. Okay? They had a duty to
14 serve the subpoenas on this. What's the
15 sanction? And there's cases, we cite them
16 in our brief, you know, where here there's
17 actual harm, because they got the records,
18 the sanction at a minimum ought to have
19 been that they had to destroy the
20 unrelated records.

21 Let me just add one other point,
22 Your Honor, to the question that you
23 asked.

24 THE COURT: I would ask that you

1 do it quickly.

2 MR. MARKS: Okay. On prejudice,
3 the other prejudice we suffered is we
4 couldn't seek a stay of the order before
5 the discovery was issued.

6 We got a stay from the
7 11th Circuit. Even if Judge Broderick
8 disagreed with us, okay, if we had had
9 notice, and we would have litigated it,
10 and he would have entered the order before
11 the subpoenas were served, or at least
12 before the discovery was issued, it's a
13 final order, that's what happened in the
14 11th Circuit; we appealed it, we went to
15 the 11th Circuit, and we got a stay. That
16 right was stripped from us because it was
17 an ex parte proceeding that we never got
18 notice of.

19 Thank you.

20 THE COURT: Thank you both very
21 much. We will take the matter under
22 advisement.

23 (Audio transcription concluded.)

24 - - - - -

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